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IN THE

Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL
OF THE UNITED STATES, *et al.*,

Petitioners,

v.

THE FREE SPEECH COALITION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

H. LOUIS SIRKIN
Counsel of Record
LAURA A. ABRAMS
JOHN P. FELDMEIER
SIRKIN, PINALES, MEZIBOV & SCHWARTZ LLP
Attorneys for Respondents
920 Fourth and Race Tower
105 West Fourth Street
Cincinnati, Ohio 45202
(513) 721-4876

167895

Counsel Press LLC
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QUESTION PRESENTED

The Ninth Circuit Court of Appeals found two provisions of the Child Pornography Prevention Act of 1996 unconstitutional because they impose an unjustifiable restriction on free speech and are unduly vague and overbroad. The first provision bans sexually explicit visual depictions of persons who are not minors but who "appear to be" minors. The second provision prohibits sexually explicit material that is advertised in a way that "conveys the impression" that minors are depicted even though, in reality, they are not. The question presented in this case is whether, under the First Amendment, sexually explicit, non-obscene material containing no children can be banned by Congress as "child pornography" simply because the material is perceived by someone as depicting a person who "appears to be" a minor or because the material is promoted in a manner that someone believes "conveys the impression" that minors are depicted.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." The Due Process Clause of the Fifth Amendment to the United States Constitution states that "No person shall . . . be deprived of life, liberty, or property, without due process of law." The relevant provisions of the Child Pornography Prevention Act of 1996 are reproduced in an appendix to the petition for writ of certiorari. *See* Pet. App. 67a-76a.

STATEMENT OF THE CASE

A. Child Pornography Laws And The First Amendment

Over the years, Congress has enacted several laws designed to combat the real evils of child pornography by prohibiting the possession, production, and distribution of materials depicting children in a sexually explicit manner.[1] During this time, it has been understood that, in fighting the dangers of child pornography, legislation cannot "reduce the adult population . . . to reading [and viewing] only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). Accordingly, Congress has been advised that, regardless of the Government's interest in protecting children, "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox." *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 74-75 (1983).

With this understanding, legislative efforts to prohibit child pornography, and corresponding reviews of such efforts by the judiciary, have centered on the harm of child pornography to the children used in its production, and not on the effect such material has on the adult viewer. *See* Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225,

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[1] *See American Library Ass'n v. Barr*, 956 F.2d 1178, 1181-85 (D.C. Cir. 1992) (providing a history of federal child pornography legislation).

92 Stat. 7 (1977) (prohibiting the use of a minor in the production of sexually explicit depictions). Indeed, prior to 1996, the common purpose and effect of all child pornography legislation was to ensure that children were not used or otherwise exploited as the subjects of, or participants in, sexually explicit materials.[2] *See* S. Rep. No. 358, at 29 (1996).

In 1982, this Court established the constitutional framework for preserving the rights of adults while fighting the real harm of child pornography. In *New York v. Ferber*, 458 U.S. 747 (1982), this Court held that sexually explicit material depicting actual children is unprotected by the First Amendment regardless of whether it is obscene, but that non-obscene simulations of child pornography that do not involve real children in making the images "retain[] First Amendment protection." *Id.* at 765. This ruling was based on documented evidence that minors can suffer serious harm by participating as *performers* in sexually explicit materials. *See id.* at 758-59. This Court therefore has made clear that Congress can ban child pornography only to the extent that the proscribed material portrays sexually explicit conduct by actual children. *See id.* at 764. The Court specifically authorized the use of young-looking adults in non-obscene, sexually explicit performances so that the literary, artistic, and scientific value of sexual depictions can be preserved under the First Amendment. *Id.* at 765.

Given the constitutional framework of *Ferber*, Congress passed the Child Protection Act of 1984, which prohibited the distribution, possession, or sale of material depicting actual children engaged in sexual activity, regardless of whether the material is obscene. *See* Pub. L. No. 98-292, 98 Stat. 204 (1984) (codified as amended at 18 U.S.C. §§ 2251-2253). This Act, combined with preexisting legislation passed in 1977 prohibiting the use of minors in sexually explicit productions,

[2] "Child" and "minor" are used synonymously in this brief. A minor is defined as "any person under the age of eighteen years." 18 U.S.C. § 2256(1) (Supp V 1999).

see 18 U.S.C. §§ 2251-2253, targeted materials depicting actual children and the individuals who actually abuse them. In so doing, Congress established a highly effective network for fighting the real evils of child pornography and real acts of sexual abuse, while preserving the constitutional freedoms of law-abiding adults under the First Amendment.

The viability and prudence of this constitutional balance were reinforced in 1986 when the Attorney General's Commission on Pornography released its Final Report on child pornography. *See* Attorney General's Comm'n on Pornography, Final Report 405-418, 595-735 (1986) [hereinafter Final Report or Report]. The Report examined the effect of sexually explicit, "fictional" depictions of children and concluded that these depictions should not be considered "child pornography." Final Report, 596. Consistent with *Ferber*, the Report cautioned that the term "child pornography" is "only appropriate as a description of material depicting *real* children." *Id.* at 597 (footnote omitted). By way of example, the Report concluded that a sexually explicit film adaptation of Vladimir Nabokov's novel, *Lolita*, using an adult actress to play the part of a young girl, "could never be 'child pornography'" because it does not depict an actual child engaged in sexual conduct. *Id.* at 598. The Report also found that, although there is a "significant use" of "adult sexually explicit material" to lure children into sexual activity, there was insufficient evidence of such activity to justify further limitations on adult materials. Thus, the Report concluded that legislators should not pass child pornography legislation designed to "'burn the house to roast the pig.'" *Id.* at 411 n.74 (citing *Butler v. Michigan*, 352 U.S. 380, 383 (1957)); *see also* Ronald Adelman, *The Constitutionality of Congressional Efforts to Ban Computer-Generated Child Pornography: A First Amendment Assessment of S. 1237*, 14 J. Marshall J. Computer & Info. L. 491 (1996) (interpreting the Final Report to suggest that the use of child pornography to lure children "played a relatively small part in the Commission's view of the overall problem").

Following the Final Report, Congress passed the Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, § 2, 100 Stat. 3510 (1986) (codified as amended at 18 U.S.C. § 2251), which banned the use and production of advertisements for child pornography. Two years later, Congress enacted the Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified as amended at 18 U.S.C. §§ 2251A-2252), which banned the use of computers to transport, receive, or distribute child pornography and required producers of sexually explicit materials to maintain records of performers' names and birth dates. *See* 18 U.S.C. § 2257. Congress followed this legislation with the Child Protection Restoration and Penalties Enhancement Act of 1990, which prohibited the possession of three or more pieces of child pornography. *See* Pub. L. No. 101-647, § 301, 104 Stat. 4789 (1990) (codified as amended at 18 U.S.C. § 2252(a)(4)). In 1994, Congress amended its laws by punishing the production or importation of sexually explicit depictions of minors. *See* Pub. L. No. 103-322, § 16001, 108 Stat. 2036 (1994) (codified as amended at 18 U.S.C. § 2259). As with prior legislation, all of these laws were designed to preclude actual minors from being depicted in a sexually explicit manner, while still preserving the right of adults to read and view non-obscene, constitutionally-protected materials.

B. The Child Pornography Prevention Act Of 1996

This constitutional balance, however, was disrupted on September 30, 1996, with the passage of the Child Pornography Prevention Act of 1996 ("CPPA" or "Act"). This Act radically expands the definition of "child pornography" by including within that definition sexually explicit depictions of nonchildren, including youthful-looking adults and fictional characters.[3]

[3] The CPPA amended Title 18, Chapter 110 of the United States Code by revising §§ 2251, 2252, 2256 and adding a new § 2252A. Section 2252A, entitled "Certain activities relating to material constituting or containing chi pornography," prohibits persons from, (Cont'd)

Pub. L. No. 104-208, Div. A, Tit. I, § 121, 110 Stat. 3009-26 to 3009-31. Under the CPPA, child pornography is now defined as any sexually explicit material that: (1) depicts actual minors; (2) depicts persons who appear to be minors; (3) modifies or alters the image of an identifiable minor so that the minor appears to be engaging in sexually explicit conduct; or (4) is advertised or described so as to convey the impression that it depicts a minor. *See* 18 U.S.C. § 2256(8).

Thus, in addition to banning visual depictions of real children who are actually involved in sexually explicit conduct, *see* 18 U.S.C. § 2256(8)(A), or whose images are altered, *see* 18 U.S.C. § 2256(8)(C), the CPPA also prohibits visual depictions of adults or nonpersons who "appear to be" minors engaging in sexually explicit conduct and material that, while not containing sexually explicit depictions of identifiable minors, "conveys the impression" that it might have such depictions. The "appears to be" and "conveys the impression" provisions of 18 U.S.C. § 2256(8)(B) and (D) criminalize material that was not produced using actual children and does not contain images of identifiable children, and thus, is not, in the traditional sense of the term, "child" pornography. *See* Final Report at 596 (finding that, while sexually explicit portrayals of fictional characters might "deeply offend modern sensibilities regarding the rearing and protection of children, they are not 'child pornography' in the specific legal and clinical sense that the term has acquired over the past fifteen years"). In addition, these two revolutionary phrases are not defined or otherwise explained by the CPPA or any other federal law. Under these circumstances, these two provisions mark a "significant departure" from the "permissible bounds of *Ferber*." S. Rep. No. 358, at 37.

(Cont'd)
inter alia, mailing, transporting, receiving, distributing, reproducing, selling, or possessing *child pornography*, as redefined by the CPPA, within interstate or foreign commerce.

The CPPA further departs from *Ferber* by banning not only depictions of actual acts of sexually explicit conduct by minors, but also simulated acts of such conduct. *See* 18 U.S.C. §§ 2256(2)(A)-(E). Under the CPPA, acts between two consenting adults, who may appear to some viewers to be minors, involving only simulated, not actual, sexual activity are condemned and prohibited as illegal child pornography. The implications of this vast departure from the constitutional framework of *Ferber* are profound. Mainstream movies such as "Romeo and Juliet," "The Blue Lagoon," "Fast Times at Ridgemont High," "The Exorcist," "Pretty Baby," and "Lolita," all of which arguably depict simulated sexual activity by persons who appear to be minors,[4] can now be deemed criminal contraband, and those possessing, producing, or distributing such materials face up to fifteen years in prison.[5]

C. Warnings To Congress Regarding The Unconstitutionality Of The CPPA

The CPPA's radical alteration and expansion of "child pornography" was enacted despite protests by several members of Congress and numerous constitutional scholars who viewed the CPPA as an unconstitutional restriction on speech. Congress was repeatedly warned that the bill would not pass constitutional muster because "[b]y criminalizing all visual depictions that 'appear to be' child pornography – even if no child is ever used or harmed in its production – [the CPPA] prohibits the very type of depictions that the Supreme Court has explicitly held protected." S. Rep. No. 358, at 29. Harvard University Professor, Frederick Schauer, who was the Commissioner of the Attorney General's Commission on Pornography, was joined by fourteen other constitutional scholars in advising Congress that the CPPA

[4] *See* Bob Van Voris, "Coming Soon . . . 'Lolita,' The Lawyer's Cut," *The National Law Journal*, Aug. 17, 1998, at A1 (listing numerous films that can now be considered "child pornography" under the CPPA).

[5] First time offenders of the CPPA face up to fifteen years in prison, while repeat offenders face no less than five years and up to thirty years in prison. *See* 18 U.S.C. § 2252A(b)(1).

would be found unconstitutional, thereby rendering it useless in the battle against child pornography. *See id.* Other legislators warned Congress against the "dramatic expansion" of child pornography legislation sought by the CPPA because "[t]he Supreme Court has repeatedly held, in a number of different areas, that expression may not be regulated solely for its effect upon others." *Id.* at 37.

Additionally, after the United States District Court for the Eastern District of Pennsylvania invalidated the Communications Decency Act – another piece of legislation roundly criticized by several members of Congress and ultimately struck down by this Court[6] – for its violations of the First Amendment, *see American Civil Liberties Union v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996), Congress was further advised that the CPPA was similarly deficient:

> This legislation marks the second occasion that this Congress has embarked upon an unconstitutional course in seeking to address activity which is being conducted via modern technology. Unfortunately, just as the Communications Decency Act sought to alter our constitutional framework, [the CPPA] departs from precedent as well. There can be no doubt that the advent of emerging computer technology poses challenges to our society on many

[6] The Communications Decency Act ("CDA") passed by Congress in February 1996 – a mere eight months before the CPPA's enactment – sought to protect minors from harmful Internet materials by banning the transmission of "indecent" or "patently offensive" communications to persons under the age of eighteen. Prior to its passage, Congress was cautioned that the CDA fell short of First Amendment standards because the "indecent" and "patently offensive" provisions were unduly vague and unnecessarily overbroad, thereby infringing upon constitutionally-protected expression. These criticisms ultimately were proven to be valid when the two criticized provisions were struck down by this Court as facially overbroad under the First Amendment. *See Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

> fronts, some challenges are positive and some are not. However, we should not abandon the Constitution in seeking to resolve those challenges.

S. Rep. No. 358, at 38.

In response to these criticisms, the Senate added a safeguard section prohibiting the use of "identifiable minors in visual depictions of sexually explicit conduct." 18 U.S.C. § 2256(8)(C). This section was added to address the concern that the definition of child pornography "may be at risk of judicial invalidation insofar as it reaches images that do not depict actual minors," and the belief that if the "appears to be" and "conveys the impression" provisions of the CPPA were invalidated, at least the prohibition against using identifiable minors for computer morphing would remain intact. *See* S. Rep. No. 358, at 11, 31. Congress also included a severance clause providing that, if some aspect of the CPPA's new child pornography definition were to be found unconstitutional, the invalidation of one element of the definition would not necessarily render inoperable the entire statutory framework. *See* CPPA, Pub. L. No. 104-208, § 8, 110 Stat. 3009, 3009-31 (1996).

D. The Free Speech Coalition Challenges The CPPA

Fearing that the CPPA jeopardized the expressive activity of its members, the Free Speech Coalition, Bold Type, Inc., Jim Gingerich, and Ron Raffaelli (collectively "Free Speech" or "Respondents")[7] filed a complaint challenging the Act in the

[7] The Free Speech Coalition is a California trade association that assists film makers, producers, distributors, wholesalers, retailers, and Internet providers located throughout the United States in the exercise of their First Amendment rights and in defense of those rights against censorship. Free Speech represents more than six hundred businesses and individuals involved in the production, distribution, sale, and presentation of non-obscene, adult-oriented materials. *See* Pet. App. 3a. Bold Type, Inc. publishes *California's Nude Beaches*, a book dedicated to the education and expression of the ideals and philosophy associated with nudism. *Id.* Jim Gingerich is a well-known artist from (Cont'd)

United States District Court for the Northern District of California on January 27, 1997. Pet. App. 3a. The complaint asserted, *inter alia,* that the "appears to be" and "conveys the impression" provisions of the CPPA: (1) prohibit expression in violation of the First Amendment; (2) contain overbroad and vague language in violation of the Fifth Amendment's Due Process Clause; and (3) unduly chill constitutionally-protected speech in violation of the First Amendment. *See id.* at 50a.

Respondents did not challenge 18 U.S.C. § 2256(8)(A), which prohibits materials depicting actual children engaging in sexually explicit conduct. *See* Pet. App. 10a-11a. Nor did Respondents challenge 18 U.S.C. § 2256(8)(C), which prohibits computerized "morphing" of identifiable children, an activity whereby images of real and identifiable children are altered by a computer so that the children are depicted in sexually explicit conduct. *See id.* Respondents believe that, because these materials contain sexual depictions of real and identifiable children, or at least parts thereof, it is possible that such images could harm the children depicted. *See id.*

As stated in their complaint, Respondents do not advocate or tolerate the production or distribution of child pornography involving real children, and in fact have assisted in the eradication of such materials by offering and providing a reward of up to ten thousand dollars in cash to any person providing information leading to the arrest and conviction of persons involved in child pornography. Record 2. Despite Respondents' opposition to child pornography, they are nonetheless threatened and injured by the CPPA because they produce, distribute, and/or possess materials, including film, photographs, paintings, and computerized images that are, or could easily be deemed,

(Cont'd)
New York City whose paintings include landscapes and large-scale nudes. *Id.* Ron Raffaelli is a well-known, professional photographer who specializes in erotic photography and has published four erotic books including *Rapture* by Media Press. *Id.*

sexually explicit. Although none of the materials contains sexually explicit depictions of actual minors, the persons or nonpersons depicted in these materials may appear to some viewers to be minors or the materials' advertising may convey the impression to some people that the materials contain sexually explicit depictions of minors. *See id.* at 3. In light of the fact that the CPPA prohibits materials in which there "appears to be . . . a minor engaging in sexually explicit conduct" or that are advertised, promoted, presented, described, or distributed in such a way as to "convey the impression" that a minor is engaging in sexually explicit activity, a number of persons have ceased the production, distribution, and possession of certain forms of expression, which do not involve minors, in fear of being prosecuted under the Act.[8] *Id* at 17-23 (affidavits of Gary Palao, Harlan Shapers, and George Polera).

On August 12, 1997, following cross motions for summary judgment filed by the parties, the district court issued an order and judgment upholding the constitutionality of the CPPA. *See* Pet. App. 50a-66a. Apparently subscribing to the politically-popular belief that "if a law is passed in the name of children, it must be constitutional," the district court upheld the CPPA as a content-neutral law that properly regulates the time, place, and manner of speech. *Id.* at 56a-58a. The court reasoned that "[g]iven the nature of the evils that anti-child [*sic*] pornography laws are intended to prevent, the CPPA can easily be deemed a content-neutral regulation." *Id.* at 57a. Ignoring the constitutional balance recognized in *Ferber*, the court further found that the CPPA is neither unduly overbroad nor vague and that it does not constitute a prior restraint on speech. *See id.* at 62a-64a. Based on these conclusions, the court entered judgment in favor of the Government. *See id.* at 66a.

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[8] *See* Van Voris, "Coming Soon . . . 'Lolita,' The Lawyer's Cut," *The National Law Journal*, Aug. 17, 1998, at A1 (discussing the self-censorship in the film industry caused by the CPPA).

Respondents appealed to the Ninth Circuit Court of Appeals, where the lower court's ruling was reversed. The Ninth Circuit found that the CPPA is not content neutral because it contains a blanket suppression of an entire category of speech and is not a time, place, or manner regulation. *See id.* at 14a-19a. The court determined that, even though Congress may have enacted the CPPA in part to address the secondary effects of speech appearing to depict children's sexual activity, such intent did not render it content-neutral. *See id.* Finding no demonstrable basis for linking computer-generated child pornography to the sexual abuse of children and only a minimal use of other sexually explicit materials depicting youthful-looking, real people to lure children, the court concluded that the CPPA is a content-specific ban on protected speech that is not narrowly tailored to meet a compelling governmental interest. *See id.* at 20a. The court restored the constitutional balance recognized in *Ferber*, stating:

> By criminalizing all visual depictions that "appear to be" or "convey the impression" of child pornography, even where no child is ever used or harmed in its production, Congress has outlawed the type of depictions explicitly protected by the Supreme Court's interpretation of the First Amendment. Because the 1996 Act attempts to criminalize disavowed impulses of the mind, manifested in illicit creative acts, we determine that censorship through the enactment of criminal laws intended to control an evil idea cannot satisfy the constitutional requirements of the First Amendment.

Id. at 22a.

The court further found the "appears to be a minor" and "conveys the impression" provisions void for vagueness because the two phrases are "highly subjective" and "provide no measure to guide an ordinarily intelligent person about prohibited conduct and any such person could not be reasonably certain about whose perspective defines the appearance of a minor, or whose

impression that a minor is involved leads to criminal prosecution." *Id.* at 24a. The court ruled that the lack of definitions for these key phrases permits law enforcement officials to exercise their discretion in an arbitrary and discriminatory fashion. *See id.*

In addition, the court deemed the two challenged phrases to be unconstitutionally overbroad because they are "insufficiently related to the interest in prohibiting pornography actually involving minors to justify [their] infringement of protected speech." *Id.* at 26a. The court concluded that the CPPA's inclusion of constitutionally-protected activity as well as legitimately prohibited activity makes it unconstitutionally overbroad. *See id.* at 27a.

Petitioners moved the court of appeals for rehearing and rehearing en banc, but these petitions were denied. *See id.* at 44a-45a.

SUMMARY OF ARGUMENT

A. The Child Pornography Prevention Act of 1996 may well be, as Petitioners suggest, "the product of Congress's determination that advances in computer technology make possible the creation of images that are virtually indistinguishable from depictions of real children engaged in sexually explicit conduct." Pet. Brief 13. However, in enacting the CPPA, Congress failed to limit the materials it banned as child pornography to only those sexual depictions that are "virtually indistinguishable" from real children. Rather, Congress chose to ban *all* materials, however produced, which depict persons or nonpersons who "appear to be" minors or which "convey the impression" that a minor is depicted engaging in sexual conduct. As a result of the CPPA's broad language, all manner of material is banned – not just the computer-generated images argued by Petitioners. Drawings, cartoons, sculptures, and paintings involving depictions of minors, adults, and nonpersons who "appear to be minors" or which are promoted in such a way as to "convey the impression"

that minors are depicted engaging in sexual conduct are all criminalized by the CPPA. Thus, the CPPA does much more than simply ban "virtual child pornography" that is indistinguishable from depictions of actual children, and this Court's review must analyze the First Amendment implications of the CPPA's ban on each of the types of material involved.

B. The CPPA is a content-specific regulation on speech because it regulates expression based on the ideas it conveys to viewers. As such, the CPPA is presumed to be unconstitutional, *see R.A.V. v. City of St. Paul,* 505 U.S. 377, 382 (1992), and must be subjected to the most exacting constitutional scrutiny by this Court, *see Boos v. Barry*, 485 U.S. 312, 321 (1988). In an effort to avoid strict scrutiny analysis of the CPPA, Petitioners interpret *Ferber* to hold that the type of depictions banned by the CPPA are unprotected by the First Amendment. Pet. Brief 19 (citing *Ferber*, 458 U.S. at 764). *Ferber* made no such determination. In fact, *Ferber* specifically found that the types of materials banned by the CPPA *retained* First Amendment protections. What *Ferber* held to be unprotected were materials involving live performances or reproductions of live performances of actual children engaging in sexually explicit conduct. *Ferber*, 458 U.S. at 762, 764. According to the express holding of *Ferber*, the universe of other non-obscene materials depicting sexual conduct of children – without the use of actual children to produce the depictions – "retains First Amendment protection." *Id.* at 765. Moreover, despite Petitioners' arguments to the contrary, the "principal considerations" of *Ferber* do not provide any basis for ignoring the express holding of *Ferber* that certain types of depictions of child sexual conduct, such as those prohibited by the CPPA, are protected by the First Amendment.

C. The content-specific provisions of the CPPA are not supported by a compelling governmental interest because they exceed the Government's well-defined interest in regulating child pornography, which is limited to works that visually depict sexual conduct by actual children. *Ferber*, 458 U.S. at 764.

Although child pornography depicting real children is classified as unprotected speech, this Court has specifically endorsed the use of young-looking adults in non-obscene, sexually explicit performances to preserve that the literary, artistic, and scientific value of sexual depictions under the First Amendment. *Id.* The Attorney General's Commission on Pornography likewise adopted this limited governmental interest in regulating child pornography, stating that the term "'child pornography' *is only appropriate as a description of material depicting real children*" and that sexually explicit material using adults to depict child sexual activity "*could never be 'child pornography'*" because it does not depict an actual child engaged in sexual conduct. Final Report at 597-98 (emphasis added).

The CPPA's "appears to be" and "conveys the impression" provisions are not narrowly tailored to serve Congress' limited interest in regulating child pornography because these provisions define "child pornography" as something other than "child" pornography and punish as criminal activity constitutionally-protected expression that does not depict actual minors. The CPPA extends beyond *Ferber* and the Final Report by banning such a broad array of depictions that the message of childhood sexuality is silenced regardless of its artistic, literary, or scientific value. The CPPA also suppresses large quantities of non-obscene materials that do not depict real children engaged in sexually explicit conduct, such as movies using adult actors to depict teenage sexual activity, illustrations of childhood sexuality in scientific texts, and sexually explicit artwork depicting completely fictitious children.

Petitioners contend that the legislative findings support a compelling governmental interest in regulating sexual expression beyond the interest stated in *Ferber*. However, these findings that material depicting nonchildren are being used to: (1) seduce children into sexual activity; (2) whet the sexual appetites of pedophiles; (3) sustain the market for sexually explicit materials depicting actual children; and (4) prevent

prosecutors from obtaining convictions in child pornography cases are not supported by sufficient evidence. Thus, these findings cannot supply any governmental interest, much less a compelling one, for the CPPA's "appears to be" and "conveys the impression" provisions. Moreover, even if such evidence existed, Petitioners' findings, which all relate to the *potential conduct* of pedophiles and child molesters, are not narrowly tailored to, and cannot justify, an absolute ban on traditionally-protected forms of *expression* by law-abiding adults.

D. The CPPA's "appears to be" and "conveys the impression" provisions are unconstitutionally overbroad because they suppress vast amounts of material protected by the First Amendment. The CPPA directly contravenes this Court's holding that, if the visual depictions of sexual activity by minors "[are] necessary for literary or artistic value, a person over the statutory age who perhaps looked younger [can] be utilized." *Ferber*, 458 U.S. at 763-64. It also ignores this Court's repeated admonition that the government's interest in protecting children does not justify reducing the entire adult population to reading and viewing only what is fit for children. *See Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 128 (1989). The "appears to be" and "conveys the impression" provisions are not limited to material that causes harm to children. These general and undefined provisions encompass inordinate quantities of film, sculpture, photography, paintings, illustrations, and drawings that bear no relationship to exploiting children.

Moreover, the CPPA's overbreadth problems are not solved by the Act's affirmative defense provision because, *inter alia*, that provision does not protect illustrators and artists who depict fictional images created solely from their imaginations or consumers and distributors who are not involved in the production of sexually explicit materials and do not know the actual age of the persons depicted.

E. The CPPA is void for vagueness under the Fifth Amendment's Due Process Clause because it fails to define the phrases "appears to be a minor" and "conveys the impression of a minor." By failing to define these critical phrases, the CPPA fails to give persons of ordinary intelligence a basic understanding of what is prohibited and gives law enforcement officials unbridled discretion to enforce the Act in arbitrary and discriminatory ways. Contrary to Petitioners' suggestion, the vagueness inherent in the CPPA cannot be remedied by Petitioners' argument that the "unsuspecting viewer" language taken from the general legislative findings (and inexplicably augmented with a "reasonable person" standard) provides the much-needed definitions for the "appears to be" and "conveys the impression" provisions left undefined by the CPPA. *See* Pet. Brief 40. Even assuming, *arguendo*, that a random phrase taken out of context from the general legislative findings of a statute can be utilized to define the text of a statute, the phrase relied on by Petitioners cannot "cure" the CPPA's vagueness. While the inserted phrase may provide guidance concerning *who* must determine what "appears to be" or "conveys the impression" of a minor, it provides no guidance whatsoever to ordinary persons who are attempting to conform their conduct to the law, or to government officials attempting to apply the law in a nondiscriminatory fashion concerning *what* "appears to be" or "conveys the impression" of a minor. Accordingly, neither the text of the CPPA nor the phrase suggested by Petitioners provide the "explicit standards" for enforcement required by the Due Process Clause, and thus the CPPA's "appears to be" and "conveys the impression" provisions are void for vagueness.

ARGUMENT

A. The Scope Of The CPPA Is Considerably Broader Than Petitioners Suggest And The Scope Of Respondents' Challenge To The Act Is Much Narrower.

1. The CPPA Bans Far More Expression Than "Virtually Indistinguishable" Forms Of Child Pornography.

Throughout their brief, Petitioners premise their arguments on a mischaracterization of the scope of the CPPA, apparently in the hope that if this Court adopts Petitioners' narrow version of the Act, the Court will forego a detailed analysis of the text of the Act and uphold its unduly broad provisions. Specifically, Petitioners repeatedly argue that the types of expression banned by the CPPA are only those computer-generated images which are "'virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct.'" Pet. Brief 21, 22, 23, 25, 28, 36, 40, 42 (quoting 18 U.S.C. § 2251 note (Supp. V 1999) (Historical & Statutory Notes)). This narrowing of the CPPA has, in error, been accepted by several circuit courts and embraced by the media who refer to the CPPA as banning "virtual child pornography."[9] But the text of the CPPA bans much more expression than just the computer-generated or "virtual" child pornography suggested by Petitioners and blindly accepted by others.

The text of the CPPA bans as "child pornography":

> *any visual depiction*, including any photograph, film, video, picture, or computer or computer-generated

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[9] *See United States v. Fox*, 248 F.3d 394, 405 (5th Cir. 2001); *United States v. Mento*, 231 F.3d 912, 921 (4th Cir. 2000), *petition for cert. filed*, No. 00-8114; *United States v. Hilton*, 167 F.3d 61, 72 (1st Cir.), *cert. denied*, 528 U.S. 844 (1999); *United States v. Acheson*, 195 F.3d 645, 648-49 (11th Cir. 1999); Stuart Taylor Jr., *Is it Sexual Exploitation if the Victims are 'Virtual'?*, Newsweek, Mar. 19, 2001, at 51; Joan Biskupic, *High Court Takes on 'Virtual' Child Porn*, USA Today, Jan. 23, 2001, at 3A.

image or picture, *whether made or produced by electronic, mechanical, or other means*, of sexually explicit conduct where –

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or

(D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct. . . .

18 U.S.C. § 2256(8) (emphasis added).[10]

Subsection A and a portion of subsection B of the Act ban true child pornography involving the use of actual minors in the production of sexually explicit materials. *See* 18 U.S.C. § 2256(8)(A),(B). The remaining portions of subsection B and subsections C and D ban material not previously considered "child pornography." Sexually explicit depictions of adults who "appear to be" minors are banned by subsection B; computer-generated or "morphed" images of children from images of identifiable minors are banned in subsection C; and depictions which do not include a minor but which are promoted in such a way as to convey the impression that a minor is depicted are banned in subsection D. *See* 18 U.S.C. § 2256(8)(B)-(D).

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[10] The term "visual depiction" is further defined to "include[ ] undeveloped film and videotape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image." 18 U.S.C. § 2256(5) (Supp. V 1999).

Thus, by its plain language, the CPPA bans four distinct categories of depictions. *See United States v. Mento*, 231 F.3d 912, 922 (4th Cir. 2000). Petitioners' repeated references to the materials banned by the CPPA as merely "depictions that are 'virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct'" are not supported, and in fact are directly refuted, by the text of the CPPA. *See* Pet. Brief 21, 22, 23, 25, 28, 36, 40, 42. The "virtually indistinguishable" language relied upon by Petitioners to limit the application of the CPPA appears nowhere in the text of the CPPA. Rather, that language appears only in the general findings of Congress, which are included as one of the historical and statutory notes contained in the annotated version of the United States Code. *See* 18 U.S.C.A. § 2251 note. Legislative findings, however, cannot be used to interject requirements into an Act that are neither expressed nor implied on its face. *See Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 260 (1994) (stating that "the quoted statement of legislative findings is a rather thin reed upon which to base a requirement of economic motive neither expressed nor, we think, fairly implied in the operative sections of [RICO]").

Moreover, even if the legislative findings, taken out of context, could generally narrow the scope of the plain language of a statute, such an extreme method of statutory construction cannot be utilized to interpret a statute, such as the CPPA, where the legislative history is abundantly clear that the plain language is exactly what Congress intended it to be. In drafting the CPPA, Congress made it clear that the "appears to be" and "conveys the impression" provisions were based on the belief that "[p]ornographic depictions which *appear to be* those of children engaging in sexually explicit conduct . . . deserve no First Amendment protection." *See* S. Rep. No. 358, at 18 (emphasis added). Even after Congress was repeatedly warned that it could not "prohibit visual depictions which 'appear to be' of minors engaging in sexually explicit conduct but were produced without using actual children," it chose to "disagree" with this warning

and maintain the "appears to be" and "conveys the impression" provisions. *Id.* at 21 (noting the Senate Committee's disagreement with Professor Frederick Schauer's admonition against the challenged phrases).

Accordingly, the express language of the CPPA and the statements of members of Congress as to its scope unequivocally refute Petitioners' attempt to narrow the CPPA's prohibitions to only those computer-generated images that are "virtually indistinguishable . . . from unretouched photographic images of actual children engaging in sexually explicit conduct." The CPPA's ban on forms of expression is much broader than Petitioners' narrow characterization would suggest. Therefore, the Court must reject Petitioners' invitation to review the constitutionality of the entire Act on the basis of a more narrow scope, and instead review the constitutionality of the CPPA on the basis of the overwhelmingly broad array of materials the Act actually bans — including drawings, cartoons, sculptures, and paintings involving depictions of minors, adults, and nonpersons engaging in sexual conduct.

2. Scope Of The Challenge To This Court

That being said, it is important to note that the review of this case is limited to only those prohibitions contained in 18 U.S.C. § 2256(8)(B) and 18 U.S.C. § 2256(8)(D), the so-called "appears to be" and "conveys the impression" provisions. Respondents do not, and have never, challenged those portions of the CPPA which ban the production and distribution of materials depicting *actual* children engaged in sexually explicit conduct. *See* 18 U.S.C. § 2256(8)(A). Nor do Respondents challenge those portions of the CPPA which prohibit "morphing" the images of identifiable minors to create a depiction in which the actual minor appears to be engaging in sexually explicit conduct. *See* 18 U.S.C. § 2256(8)(C). Both of these sections ban materials utilizing actual children in the production of sexually explicit material.

Respondents only challenge, and seek protection from, those portions of the CPPA which ban material depicting adults

or nonpersons engaging in sexually explicit conduct. Specifically, Respondents challenge the constitutionality of subsections B and D of the Act which ban visual depictions of sexually explicit conduct where the "visual depiction is, or appears to be, of a minor" (18 U.S.C. § 2256(8)(B)), or where the depiction is promoted in such a manner that "conveys the impression" that the material contains a depiction of a minor engaging in sexually explicit conduct (18 U.S.C. § 2256(8)(D)). Respondents submit that these prohibitions on the visual depictions of adults and nonpersons threaten the continued creation, distribution, and presentation of many valuable and constitutionally-protected photographs, books, magazines, motion pictures, television programs, and other works of art that contain visual depictions of sexuality. As such, the CPPA's ban on these types of material violates the First Amendment.

B. The Broad Range Of Materials Banned By The CPPA's "Appears To Be" And "Conveys The Impression" Provisions Are Protected By The First Amendment And Any Restrictions On Those Materials Must Be Subjected To Strict Scrutiny Analysis.

Petitioners begin their argument to the Court by implicitly conceding, as they must, that the prohibitions contained in the CPPA are content-based restrictions on speech. Pet. Brief 19. Petitioners further acknowledge that "[l]egislation that restricts speech based upon its content is ordinarily subject to strict scrutiny and may be upheld only if it is narrowly tailored to further a compelling interest." *Id.* (citing *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000)). Nonetheless, Petitioners claim that the content-based restrictions on speech contained in the CPPA do not merit strict scrutiny analysis because the newly-prohibited forms of expression fall within one of the narrowly limited classes of speech that the Court has deemed to be without First Amendment protection. Pet. Brief 19 (citing *Ferber*, 458 U.S. at 764). Petitioners' efforts to avoid the most exacting scrutiny of the CPPA are without merit.

1. *Ferber* Expressly Retains First Amendment Protections For Materials Banned By The CPPA.

In *Ferber*, this Court considered the question of whether criminal statutes could constitutionally "prohibit the dissemination of material which shows children engaged in sexual conduct, regardless of whether such material is obscene." 458 U.S. at 753. In answering this question in the affirmative, the Court classified "child pornography" as a "category of material outside the protection of the First Amendment." *Id.* at 763. The Court, however, expressly limited the materials that constitute "child pornography" to those materials involving "live performance or photographic or other visual reproduction of live performances" of actual children engaged in sexually explicit conduct. *Id.* at 65. As for the universe of other materials, the Court expressly stated that "the distribution of descriptions or other depictions of [child] sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other depictions of live performances, retains First Amendment protection." *See id.* at 764-65.

None of the depictions banned by the "appears to be" and "conveys the impression" provisions at issue in this case involve "live performance or photographic or other visual reproduction of live performances" of children engaging in sexual conduct.[11] As such, the depictions banned by the CPPA are exactly the type of depictions held in *Ferber* to be protected by the First Amendment. *Ferber*, 458 U.S. at 764-65. Under *Ferber*, then, visual depictions banned by the CPPA, such as non-obscene drawings, cartoons, sculptures, paintings, and wholly computer-generated images of nonchildren engaging in sexually explicit conduct, are fully protected by the First Amendment.

[11] Of the types of depictions prohibited by the CPPA, only those involving the reproduction of live performances by actual children engaging in sexually explicit conduct, (18 U.S.C. § 2256(8)(A)), and those involving "morphed" depictions of identifiable minors engaging in sexually explicit conduct, (18 U.S.C. § 2256(8)(D)), would fall within the ambit of the types of materials deemed by the *Ferber* Court to be without First Amendment protections.

Even if *Ferber* had not explicitly stated that depictions not involving a live performance or its reproduction retain First Amendment protection, the reasoning of *Ferber* makes clear that in exempting certain types of depictions from First Amendment protection, this Court was solely concerned with protecting actual children from being abused in the production of sexually explicit materials. 458 U.S. at 758, 764 (stating that "[t]he legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child" and holding that "the nature of the harm to be combated requires that the state offense be limited to works that *visually* depict sexual conduct by children below a specific age"). *Ferber* never suggested in any way that materials, such as those banned by the CPPA, produced without the use of any actual children were not deserving of First Amendment protection. *See id.* at 763.

For the reasons stated above, the depictions banned by the CPPA fall within the category of non-obscene depictions of sexual conduct of children expressly deemed by *Ferber* to retain the protections of the First Amendment.

2. The "Principal Considerations" Of *Ferber* Do Not Lead To The Conclusion That The Types Of Materials Banned By The CPPA Are Unprotected By The First Amendment.

Despite Petitioners' argument to the contrary, the "principal considerations" outlined in *Ferber* do not provide any basis for this Court to ignore the specific statements in *Ferber* that certain types of depictions of child sexual conduct *are* protected by the First Amendment. Nor do those considerations provide a basis for holding that the broad array of materials banned by the CPPA fall outside the protections of the First Amendment. *See* Pet. Brief 20-27.

First, Petitioners correctly note that *Ferber* found that "[t]he prevention of sexual exploitation and abuse of children

constitutes a government objective of surpassing importance." *Ferber*, 458 U.S. at 757. Petitioners then rotely state that the goal of the CPPA is to protect children from sexual exploitation. Pet. Brief 21. What Petitioners fail to recognize is that the exploitation and abuse addressed by *Ferber* was the production (and subsequent distribution) of sexually explicit material *using actual children*, not the production or distribution of sexually explicit material produced without involving actual children, which is what the CPPA bans. The government interests in these two situations are vastly different, as is addressed more fully below.

Second, Petitioners also correctly note that *Ferber* states "[t]he distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children" because the "materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation" and because the production of such harmful materials cannot be stopped without stopping their distribution. Pet. Brief 21 (quoting *Ferber*, 458 U.S. at 759). Again, however, Petitioners fail to acknowledge that *Ferber* was concerned only with the sexual abuse inherent in the *production* of sexually explicit materials using actual children. Instead, Petitioners attempt to justify the CPPA's broad ban on materials even when they are produced without the use of actual children by arguing, not that the materials banned by the CPPA are "intrinsically related" to the sexual abuse of children, but that they "foster" the sexual abuse of children. Pet. Brief 21. This is a very different question from the one considered by *Ferber*. Even if it were a proper question, however, two of the arguments Petitioners use to address it are an impermissible back-door attempt to justify a restriction on speech due to its effects and the other two are weak attempts to make analogies to the enforcement concerns described by *Ferber*.[12]

[12] The fact that these arguments also are not narrowly tailored to meet a compelling governmental interest is discussed below in Part C3.

Specifically, Petitioners argue that sexually explicit materials produced without the use of actual children could potentially harm children by: (1) being used to seduce children; and (2) being used to excite pedophiles. Pet. Brief 22-24. These arguments can be made about many things, including (for seduction) sexually explicit non-obscene images of adults and (for exciting pedophiles) non-sexual depictions of children. Moreover, these arguments do not approach the level of *direct* harm addressed by *Ferber*, *i.e.*, children being forced to engage in sexual conduct to produce sexually explicit material. Clearly, if accepted, these arguments that potential negative effects resulting from speech justify ignoring the First Amendment could be used to support a claim that almost any class of speech is outside the protections of the Constitution.

Petitioners also argue that sexually explicit materials produced without the use of actual children can foster the abuse of children because: (1) it could be difficult for law enforcement to prove whether a particular image was produced using an actual child, thus allowing persons who produce images using actual children to evade justice; and (2) images produced without the use of actual children can be traded for images produced using actual children, thus supporting the market for such materials. Pet. Brief 23-24. Neither of these arguments rise to the level of the concern raised in *Ferber*, namely that productions of sexually explicit material using actual children cannot be stopped without stopping distribution, because neither argument establishes that the production of materials using actual children cannot be stopped without also banning the materials covered by the CPPA. They also do not justify the CPPA's broad ban[13] and could logically be applied to ban almost anything.[14]

[13] For example, on the enforcement issue, a sketch, cartoon, sculpture, etc. can clearly be distinguished from materials produced using actual children.

[14] For example, adult non-obscene pornography and cash might be exchanged for sexual depictions produced using actual children.

Third, Petitioners note that *Ferber* held that live performances of children engaging in sexually explicit conduct or visual reproductions thereof were "unlikely" to "often constitute an important and necessary part of a literary performance." Pet. Brief 24 (quoting *Ferber*, 458 U.S. at 762-763). But Petitioners fail to mention that *Ferber* explicitly provided that, to the extent a sexual message was important for literary, scientific, educational or artistic purposes, it could be delivered by using young-looking adults or some other form of "simulation" in the visual depiction. *See Ferber*, 458 U.S. at 763. *Ferber* only prohibited the option of rendering a portrayal of sexual conduct of children more realistic "by utilizing or photographing children." *Id.* at 763. Yet, contrary to Petitioners' argument, it is exactly these types of simulations that are banned by the CPPA's "appears to be" and "conveys the impression" language.

Finally, Petitioners ignore the fourth and fifth considerations of the *Ferber* analysis. In its fourth consideration, *Ferber* justified the ban on live performances or visual reproductions of children engaging in sexual conduct on the grounds that it supported and provided an economic motivation for an illegal activity – the sexual exploitation and abuse of the children used in the production of the materials. *Ferber*, 458 U.S. at 761-62. The materials banned by the CPPA that are at issue here have no relation to any such illegal activity, as they are produced without the use of actual children. In its fifth consideration, *Ferber* justified its holding that live performances or visual reproductions of children engaging in sexual conduct are forms of expression outside the protections of the First Amendment on the basis that such a holding was not "incompatible" with the Court's earlier decisions. *Id.* at 763-64. Given that *Ferber* specifically stated that depictions of childhood sexuality that did not involve a live performance by an actual child or a visual reproduction thereof were protected under the First Amendment, any holding that the CPPA's ban

on materials that do not involve any actual children is constitutional would be incompatible with this Court's earlier decisions.

For all these reasons, the "considerations" of *Ferber* in no way lead to a conclusion that the materials banned by the CPPA are not fully protected by the First Amendment. Thus, because the CPPA restricts expression that is clearly protected, it must be reviewed under strict scrutiny analysis, the most exacting form of constitutional scrutiny. *See Boos v. Barry*, 485 U.S. 312, 319 (1988). "To survive this scrutiny, the government must advance a compelling interest served by its regulation of the content of protected speech, and the regulation must be narrowly tailored to serve that interest." *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989).

C. The "Appears To Be" And "Conveys The Impression" Provisions Are Not Narrowly Tailored To Serve A Compelling Governmental Interest.

1. The Government's Interest In Regulating Child Pornography Is Properly Limited To Sexually Explicit Materials Depicting Actual Children.

For nearly two decades, this Court has made it clear that the Government's interest in regulating and defining child pornography, as compelling as it may be, is "limited to works that *visually* depict sexual conduct by children below a specified age." *Ferber*, 458 U.S. at 764 (footnotes omitted). Although the Court has classified child pornography as speech unprotected by the First Amendment, the Court has specifically endorsed the use of young-looking adults in non-obscene, sexually explicit performances so that the literary, artistic, and scientific value of sexual depictions can be preserved under the First Amendment. *See id.* Accordingly, the Court has made it clear that Congress can ban child pornography as a category of speech only to the extent that the proscribed material portrays sexually explicit conduct by actual children. *See id.* at 764.

The Government's well-defined interest in regulating child pornography is reinforced by the Final Report issued by the

Attorney General's Commission on Pornography in 1986. In this Report, the Commission noted, "[i]t is clear from the Court's language [in *Ferber*], and in all statutory and scholarly definitions of the term, that 'child pornography' *is only appropriate as a description of material depicting real children*." Final Report at 597 (emphasis added). The Commission further stated that sexually explicit material that uses adults to depict child sexual activity "*could never be 'child pornography'*" because it does not depict an actual child engaged in sexual conduct. *Id.* at 598 (emphasis added).

The limitations placed on Congress in *Ferber* and reinforced in the Final Report are necessary to ensure that, in the process of protecting children, the rights of adults do not get left behind. As this Court has frequently explained, the Government cannot "reduce the adult population . . . to reading [and viewing] only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). Consistent with this admonition, this Court has repeatedly held that non-obscene material depicting adults engaged in sexually explicit conduct, whether in the form of printed material, film, telephone communications, computerized images, or live performances, is protected by the First Amendment.[15] The fact that non-obscene speech may be offensive to some individuals does not justify its suppression. *See Carey v. Population Serv. Int'l*, 431 U.S. 678, 701 (1977).

Given the fundamental rights of adults to view non-obscene material which does not depict actual children, Congress' interest in regulating child pornography is, and must continue to be, limited to the regulation of sexually explicit materials depicting or using real children.

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[15] *See Reno v. American Civil Liberties Union*, 521 U.S. 844, 874-76 (1997) (indecent images on the Internet); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65-66 (1981) (nude dancer performing in an adult bookstore); *Sable Communications*, 492 U.S. at 126 (indecent "dial-a-porn" telephone communications); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211-12 (1975) (motion pictures exhibiting nudity); *Kois v. Wisconsin*, 408 U.S. 229, 231-32, (1972) (sexually explicit poetry); *Butler*, 352 U.S. at 383-84 (books deemed harmful to children).

2. The CPPA's "Appears To Be" And "Conveys The Impression" Provisions Are Not Narrowly Tailored To Serve The Government's Interest In Regulating Sexually Explicit Material Depicting Actual Children.

The CPPA's "appears to be" and "conveys the impression" provisions are not narrowly tailored to serve the government's interest in regulating child pornography identified in *Ferber* because those provisions define "child pornography" as something other than "child" pornography and outlaw constitutionally-protected expression that does not utilize images of actual children.

The CPPA bans sexually explicit depictions of adults who happen to "appear to be minors." 18 U.S.C. § 2256(8)(B). And it outlaws visual depictions that are advertised, promoted, presented, described, or distributed in such a manner as to "convey the impression" that they contain sexually explicit depictions of minors, even though the images or performers are not actually children. 18 U.S.C. § 2256(8)(D). In so doing, the CPPA: (1) prohibits exactly what *Ferber* stated a narrowly-tailored child pornography statute must not prohibit – such a broad array of depictions that the message of childhood sexuality is silenced regardless of its artistic, literary, or scientific value,[16] *see Ferber*, 458 U.S. at 762-63; and (2) prohibits exactly what this Court has said that *all* forms of legislation must not prohibit – non-obscene material depicting adults engaged in sexually explicit conduct, *see Reno*, 521 U.S. at 874-76.

Pursuant to 18 U.S.C. § 2256(8)(B), if material appears to depict a minor engaged in sexually explicit conduct, even when in reality it does not, it is nonetheless deemed "child pornography." Under this provision, using adult actors or "body

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[16] *See* Van Voris, "Coming Soon . . . 'Lolita,' The Lawyer's Cut," *The National Law Journal*, Aug. 17, 1998, at A1 (citing a film director as stating, "I think [the CPPA is] a difficult law because it does not permit a filmmaker to accurately depict the world we live in").

doubles" to depict teenage sexual activity in films, such as "Risky Business," "The Blue Lagoon," and "Dirty Dancing," is now banned. Depictions of childhood sexuality found in medical treatises, child psychology textbooks, and teenage safe-sex manuals are now off-limits. And the display of sexually explicit art depicting children, such as ancient Greek vases[17] or Balthus' famed erotic paintings,[18] is now punishable by up to fifteen years in prison for a first-time offense. *See* 18 U.S.C. § 2252A(b)(1).

Similarly, under 18 U.S.C. § 2256(8)(D), if a visual depiction is advertised, promoted, presented, described, or distributed in such a manner as to convey the impression that it contains a sexually explicit depiction of a minor, even though it does not, it is nevertheless treated as child pornography. Consequently, the marketing of such movies as "Fast Times at Ridgemont High," "Pretty Baby," or "Lolita" converts these and other movies with similarly-suggestive titles into child pornography.

Simply stated, the CPPA's "appears to be" and "conveys the impression" provisions ban vast amounts of constitutionally-protected speech that do not involve actual children and eliminate all visual messages of childhood sexuality regardless of their artistic, literary, or scientific value. As such, these provisions are not narrowly tailored to meet Congress' interest in regulating true child pornography, and thus do not satisfy the rigors of constitutional strict scrutiny.

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[17] The Attorney General's Commission on Pornography observes that artwork depicting children engaged in sexual intercourse dates at least from Ancient Greece. *See* Final Report at 596 (citing photographic vase drawings in K.J. Dover, *Greek Homosexuality* (1978)). *See also* Reay Tannahill, *Sex in History* 67, 91 (1992) (illustrating artwork from Ancient Greece and Egypt depicting childhood sexual activity).

[18] *See United States v. Fox*, 248 F.3d 394, 405 n.51 (5th Cir. 2001) (referring to Balthus as the artist "whom Miro called the greatest realist painter of his age, . . . known, among other things, for his erotically charged paintings of young girls").

3. The Legislative Findings Do Not Support A Compelling Governmental Interest In Regulating Sexual Expression Involving No Actual Children And The "Appears To Be" And "Conveys The Impression" Provisions Are Not Narrowly Tailored To Meet The Purported Findings.

Petitioners suggest that their interest in enacting the CPPA is not limited to protecting real children depicted in sexually explicit material because the legislative findings show that new photographic and computer technologies that produce "virtual" child pornography (wherein no actual children are used or depicted) are being used to harm children. *See* Pet. Brief 2-25. Specifically, Petitioners contend that these "virtual" materials are being used to: (1) support pedophilic activity by seducing children into sexual activity and whetting the sexual appetites of pedophiles; (2) sustain the market for sexually explicit materials depicting actual children; and (3) prevent prosecutors from obtaining convictions in child pornography cases. *See id.* Petitioners claim that these methods of using "virtual" child pornography exploit children and supply a compelling governmental interest for the CPPA's "appears to be" and "conveys the impression" provisions. Petitioners' argument is without merit.

A closer look at the legislative findings proves Petitioners' claims to be untrue and/or overstated. These findings do not establish that sexually explicit material depicting an image that "appears to be" a minor or that is promoted so as to "convey the impression" that a minor is depicted, is being used to harm actual children. More fundamentally, even if such evidence existed, Petitioners' proffered interests, which all relate to the *potential conduct* of pedophiles and child molesters, do not justify an absolute ban on traditionally-protected forms of *expression* for all adults.

(a) *Pedophiles' Purported Use Of Child Pornography To Whet Their Sexual Appetites And To Seduce Children.*

In an effort to support the CPPA's "appears to be" and "conveys the impression" provisions, Petitioners suggest that there is an epidemic of computer-generated materials depicting virtual, not actual, children being used by sexual offenders to whet their sexual appetites and to seduce children. *See* Pet. Brief 21-25. But Petitioners' claims are not supported by the evidence.

As the court of appeals correctly noted, factual studies linking computer-generated materials depicting no identifiable children to the sexual abuse of children do not exist, and thus there is no "demonstrated basis to link computer-generated images with harm to real children." Pet. App. 20a. The evidence presented to Congress, and the findings made by Congress, fail to identify even one incident, much less a compelling number of incidents, where a pedophile used computer-generated, sexually explicit materials involving no actual children to seduce other children or to whet the pedophile's own sexual appetites.[19]

[19] The evidentiary focus of the Senate Report was the threat to children posed by computerized morphing – the act of taking images of identifiable children and altering them via computer to make it appear as though the minor is engaging in sexually explicit conduct. *See* S. Rep. No. 358, at 16 (claiming that a child molester or pedophile "can create, alter or modify a perfectly innocuous image or picture of a child he finds sexually attractive or desirable and produce any manner and number of pornographic depictions featuring that child, which he can use to stimulate his own sexual appetite for that particular child, with potentially tragic consequences for the child [or] [t]he computer produced depictions could be shown to the child in an effort to seduce or blackmail the child into submitting to sexual abuse or exploitation, or to other children who know the depicted child in order to seduce them"); *id.* at 26 (citing a man who "posed as a social service worker and photographed young girls in the nude and 'electronically manipulat[ed] the photos on his home computer to switch faces and body parts of little girls"). This conduct, however, is prohibited by

(Cont'd)

Absent such evidence, Petitioners are hard-pressed to suggest that there is any interest, much less a compelling one, to protect children from harms associated with images of persons who are not actual children.

Even if there were sufficient evidence linking sexually explicit materials in which no actual children are depicted and the whetting of sexual appetites or the seduction of children, the "appears to be" and "conveys the impression" provisions would still be unconstitutional because they are not narrowly tailored to confront these types of harm. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (explaining that "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox"); *Reno*, 521 U.S. at 875 ("[t]he mere fact that a statutory regulation of speech was enacted for the important purpose of protecting children from exposure to sexually explicit material does not foreclose inquiry into its validity."). Both provisions ban constitutionally-protected speech based on the theory that the message conveyed in such expression may affect the thoughts and feelings of child molesters and children. Such a basis for suppressing speech has been soundly and repeatedly rejected by this Court. *See Stanley v. Georgia*, 394 U.S. 557, 566 (1969) ("[the Government] cannot premise legislation on the desirability of controlling a person's private thoughts"); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (the government may not regulate speech based on its substantive content or the message it conveys); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (allowing the Ku Klux Klan to express racist views); *Carey*, 431 U.S. at 701 ("where obscenity

(Cont'd)

18 U.S.C. § 2256(8)(C), which bans visual depictions "created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct." This provision alone – without the assistance of the "appears to be" or "conveys the impression" provisions – addresses the real interest presented to Congress regarding the exploitation of children by computerized morphing.

is not involved, [the Court has] consistently held that the fact that protected speech may be offensive to some does not justify its suppression.").

In sum, the CPPA's "appears to be" and "conveys the impression" provisions are not supported by, or narrowly tailored to, any governmental interest in preventing pedophiles from misusing constitutionally-protected forms of expression. Simply put, if Congress wants to prevent the seduction of children, it must target the *illegal conduct* of pedophiles without unnecessarily encroaching upon the constitutionally-protected *expression* of law-abiding adults.[20]

(b) *Pedophiles' Purported Trading Of "Virtual" Child Pornography In The Child Pornography Market*

Petitioners also claim that the "appears to be" and "conveys the impression" provisions are justified by a compelling governmental interest in eliminating the sexual depictions of adults and nonchildren, which are used as "currency" in trading for pictures of real children engaging in sexually explicit conduct. Pet. Brief 38-39. In support of this theory, Petitioners cite portions of testimony where it is claimed that "virtual" child pornography is traded for other child pornography, which depicts actual children. *Id.* at 38. But there are no findings that sexually explicit material depicting no actual or identifiable children has ever been used to trade for child pornography depicting actual children. Essentially, Petitioners are playing "fast and loose" with the testimony and evidence presented to Congress. They cite studies containing ostensibly-empirical findings on sexually explicit material depicting actual children,

[20] The CPPA closely resembles many other unconstitutional attempts by Congress to ban constitutionally-protected material in the name of "saving the children." *See Reno*, 521 U.S. at 874-75 (striking down federal regulations on "indecent" material on the Internet); *Sable Communications*, 492 U.S. at 128 (rejecting a ban on "dial-a-porn" messages); *Bolger*, 463 U.S. at 73 (invalidating a ban on mailing unsolicited advertisements for birth control); and *Butler*, 352 U.S. at 383-84 (rejecting a ban on all sales of books deemed harmful to children).

and then ask this Court – and everyone else – to make the careless assumption that these findings also apply to material in which no actual or identifiable children are depicted.

For example, Petitioners claim that "[t]here was also substantial testimony presented to Congress that pedophiles exchange pictures *of children* engaged in sexual activities."[21] But Petitioners make no claim and offer no empirical evidence that pedophiles are also exchanging "appears to be" and "conveys the impression" type materials for pictures of real children. Petitioners also cite Kenneth Lanning's *Collectors in Child Pornography and Sex Rings* (Ann Burgess et al. eds., 1984) for the proposition that "child pornography and erotica" are used by pedophiles to trade for access to real children or for other depictions of children. Pet. Brief 38. But there is nothing cited from this text regarding the use of sexually explicit materials that do not depict actual children to trade for sexually explicit materials depicting actual children. Moreover, the fact that Lanning's book was published in 1984 – long before the so-called "new technologies" relied upon in the CPPA's legislative findings – is a clear indication of its immateriality to the modern forms of expression purportedly targeted by the CPPA. Plainly, this is not the type of "compelling" evidence necessary to impose fundamental and overreaching restrictions on material protected by the First Amendment.

Even if there were evidence that materials depicting no actual children were being used as "currency" in the market for actual-child pornography, the "appears to be" and "conveys the impression" provisions are not narrowly tailored to serve the Government's interest in regulating this problem. The problem, if it exists at all, is *the transaction* of "virtual" material for real child pornography, not the *expression of ideas* found in such materials. As such, any regulation of this purported problem should address the *conduct* of trading, and not the message found in traded materials that depict no actual children.

[21] Pet. Brief 38 (emphasis added) (citing Dr. Cline, Deputy Chief Postal Inspector Dupilka, and Bruce Taylor).

See Rubin v. Coors Brewing Co., 514 U.S. 476, 490-91 (1995) (invalidating a ban on disclosure of alcohol content on beer labels because the government could have pursued alternatives such as limiting the alcohol content of beer).

No one would claim that Congress could ban money, credit cards, or non-obscene "adult" pornography simply because these items are also being used to purchase or trade for sexually explicit material depicting real children. Instead, there are laws that focus on and prohibit the root of the child pornography trade problem – the *transfer* of material depicting actual children. For example, persons are prohibited from knowingly mailing, transporting, or shipping child pornography in interstate commerce. *See* 18 U.S.C. § 2252A(a)(1). And persons are further prohibited from selling child pornography, including computer-generated images of identifiable children. *See* 18 U.S.C. § 2252A(a)(4). These laws impose punishment regardless of the type of "currency" used to trade for child pornography and without encroaching upon individual rights protected by the First Amendment.

Again, Petitioners' "trading" argument fails to support either that the CPPA's "appears to be" or "conveys the impression" provisions support a compelling governmental interest or that they are narrowly tailored to serve that interest.

(c) *Pedophiles' Purported Use Of Materials Depicting No Actual Children To Escape Conviction.*

Petitioners also claim that the "appears to be" and "conveys the impression" provisions are supported by a governmental interest to "make sure that those who distribute and possess images depicting real children engaged in sexual activity do not escape prosecution and conviction." Pet. Brief 37. Petitioners contend that federal prosecutors have had difficulty in securing convictions in child pornography cases because it is difficult for them to meet their evidentiary burden of showing that the person depicted in sexually explicit materials is an actual child. *See id.* at 37. Petitioners speculate that, if prosecutors continue

to struggle to meet their burden of proof, child pornographers might be able to avoid conviction.[22] *See id.*

Despite these claims, Petitioners fail to offer a single instance where a child pornographer has escaped conviction by claiming that depictions in the prosecuted material were not proven beyond a reasonable doubt to be actual children. To the contrary, prosecutors have secured convictions in all child pornography cases where this defense was asserted. *See infra* note 23. In fact, the legislative findings do not offer a single case involving child pornography where the government was unable to satisfy its burden of proof because the accused raised a "virtual child" defense. The only case cited in these findings is *United States v. Kimbrough*, 69 F.3d 723 (5th Cir. 1995), *cert. denied*, 517 U.S. 1157 (1996), *see* S. Rep. No. 358, at 17, and the defendant in that case was convicted. Petitioners cite four additional cases that were not included in the legislative findings where defendants argued that "the pictures they were accused of possessing were not of real children."[23] Pet. Brief 37-38, n.8. But none of the defendants in these cases escaped conviction. Thus, factually speaking, Petitioners' interest in securing convictions in child pornography cases by reducing the prosecutors' burden of proof is far from compelling.

Moreover, even if Petitioners' interest were compelling, the assertion of the "virtual child" defense in a handful of cases does not justify the total suppression of all sexually explicit materials that depict persons who "appear to be" minors or that

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[22] Petitioners claim that the situation warrants a reduction in the burden on law enforcement officials by allowing them to simply demonstrate that the depictions in the targeted material "appear to be" of minors engaged in sexual conduct or that the promotion of such material "conveys the impression" that minors are engaged in such conduct. Pet. Brief 21.

[23] Petitioners cited *United States v. Fox*, 248 F.3d 394 (5th Cir. 2001); *United States v. Coleman*, 54 M.J. 869 (Army Ct. Crim. App. 2001); *United States v. Vig*, 167 F.3d 443 (8th Cir.), *cert. denied*, 528 U.S. 859 (1999); Appellant's Brief filed in *United States v. Marvin Hersh*, No. 00-14592-CC (11th Cir. 2001).

are promoted to "convey the impression" that minors are depicted. If Congress wanted to restrict a particular defense available to accused child pornographers, it should have focused its legislative efforts on the defense itself, not on the banning of entire categories of speech. *See Reno*, 521 U.S. at 874 (governmental interest in protecting children from harmful materials does not justify an "unnecessarily broad suppression of speech").

In addition, even assuming *arguendo* that prosecutors have recently had to work a little harder to detect images of actual children in some child pornography cases, that does not give Congress the authority to lighten the work-load of prosecutors by shifting the burden of proof to defendants in all such cases. Indeed, the Due Process Clause of the Fifth Amendment forbids it. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994) (stating that under 18 U.S.C. § 2252, the government must prove defendant knew that material was produced with the use of a minor); *Jacobson v. United States*, 503 U.S. 540, 548-49 (1992) (Congress' compelling interest in protecting children from the harms of sexual abuse does not justify the alteration of general rules of criminal procedure). In fact, it is hard to imagine how reducing the government's burden in criminal cases can, in any sense, be regarded as a compelling governmental interest for suppressing speech under the First Amendment. Plainly, defendants in child pornography cases cannot be required to prove the government's case. If the government makes the allegation that a child was depicted in sexually explicit conduct, it is the government that must prove that the "child" was in fact a child.

In sum, the CPPA's "appears to be" and "conveys the impression" provisions fail the rigors of strict scrutiny analysis because they are not narrowly tailored to support a compelling governmental interest. Accordingly, the court of appeals was correct in concluding, as a matter of law, that the CPPA's "appears to be" and "conveys the impression" provisions unconstitutionally ban protected speech.

D. The CPPA's "Appears To Be" And "Conveys The Impression" Provisions Are Unconstitutionally Overbroad.

Legislation regulating speech is impermissibly overbroad when it includes within its sweep not only activity that can legitimately be prohibited, but also activity that is constitutionally protected under the First Amendment. *See Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). Although the government has an interest in protecting children from harmful materials, that interest does not justify an unnecessarily broad suppression of speech addressed to adults. *See Reno*, 521 U.S. at 875.

1. The "Appears To Be" And "Conveys The Impression" Provisions Ban Vast Amounts Of Constitutionally-Protected Speech.

The CPPA's plain language, which bans both sexually explicit visual depictions of adults and nonpersons who "appear to be" minors and promotional materials that "convey the impression" that there may be depictions of minors, is unconstitutionally overbroad because it impermissibly suppresses material that is protected by the First Amendment. The CPPA directly contravenes this Court's precedent that, if the visual depiction of sexual activity by minors "[is] necessary for literary or artistic value, a person over the statutory age who perhaps looked younger [can] be utilized." *Ferber*, 458 U.S. at 763-64. Under the guise of protecting children, Congress has impermissibly cast its legislative net far beyond the permissible target of child pornography and into the waters of protected speech.

The CPPA's "appears to be" and "conveys the impression" provisions are not limited to material that causes harm to children. Rather, these general and undefined provisions encompass inordinate quantities of film, sculpture, photography, paintings, illustrations, and drawings.

See Reno, 521 U.S. at 877 (finding the CDA's "indecent" and "patently offensive" phrases to "cover large amounts of nonpornographic material with serious educational or other value"). In so doing, the phrases ban serious literary, artistic, scientific, and educational materials, which are neither obscene nor harmful to children. As a result, the Act reduces the entire adult population to viewing only what Congress perceives (wrongly) as being fit for pedophiles, child molesters, and children.

The breadth of the CPPA's content-based restriction of speech "imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as the [CPPA]." *See Reno*, 521 U.S. at 879. Petitioners have offered no such explanation. Instead, Petitioners attempt to save the two challenged provisions from an overbreadth invalidation by claiming that the law addresses only material that is "virtually indistinguishable" from depictions of real children and does not reach drawings, cartoons, sculptures, and paintings. *See* Pet. Brief, 42-44. But, again, the phrase "virtually indistinguishable" is found nowhere in the text of the CPPA. Rather, the phrases "appears to be a minor" and "conveys the impression of a minor" are the operative terms used to define the scope of the Act.

Moreover, the CPPA applies to "*any visual depiction*, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means." 18 U.S.C. § 2256(8) (emphasis added). As a result, nothing in the CPPA limits its provisions to "virtually indistinguishable" materials or exempts them from reaching drawings, cartoons, sculptures, and paintings. In fact, the specific language of the Act expressly applies to such traditionally-protected forms of speech. No matter how many times Petitioners repeat the phrase "virtually indistinguishable," it does not magically make it a part of the legislation, and it certainly does not make the CPPA any less broad.

Petitioners further claim that the potential for harm inflicted by "virtual" children depicted in sexually explicit materials containing no actual children justifies the CPPA's "appears to be" and "conveys the impression" provisions. Pet. Brief 22. The implications of this theory are both unlimited and alarming. Taken to its logical end, this theory – that the depiction of virtual, not actual, conduct can be used to ban speech – could be used to suppress countless forms of expression simply because they simulate what "appears to be" or "conveys the impression of" unfavorable conduct. Movie producers could be censored from producing such films as "Rambo," "Braveheart," "Pulp Fiction," and "The Godfather" because the simulated killing depicted in these films "appears to be" real homicide. High school drama groups could be banned from performing Shakespeare's "Romeo and Juliet" because teenage suicide "appears to be" depicted. And theater groups could be prohibited from promoting the musical "Best Little Whorehouse in Texas" because the title "conveys the impression" that illegal prostitution is depicted. This is the slippery slope of suppression that the CPPA invites us all to travel.

2. The Affirmative Defense Does Not Remedy The Inherent Overbreadth Problems Of The "Appears To Be" And "Conveys The Impression" Provisions.

Petitioners attempt to "cure" the CPPA's overbreadth problems by invoking the Act's affirmative defense provision. *See* Pet. Brief 44. Under this provision, a person charged with *producing or distributing* alleged child pornography must demonstrate that: (1) the material was produced using an actual person; (2) the actual person was an adult; and (3) the person charged did not advertise or promote the material in such a manner as to convey the impression that it contains a visual depiction of a minor. *See* 18 U.S.C. § 2252A(c). The defense requires persons charged with *possessing* alleged child pornography to prove that: (1) there were three or fewer images; and (2) either the images were destroyed or reported and

provided to law enforcement officers. *See* 18 U.S.C. § 2252A(d). This defense, however, does not remedy the expansive "appears to be" and "conveys the impression" provisions because it excludes from its protection countless numbers of presumptively-protected materials.[24] As such, the defense fails to narrowly and properly tailor the enormously broad prohibitions on speech imposed by the "appears to be" and "conveys the impression" provisions.

For instance, the affirmative defense's requirement that persons charged with producing or distributing "child pornography" must show that their work "was produced using an actual person or persons engaging in sexually explicit conduct," 18 U.S.C. § 2252A(c)(1), renders the defense useless for illustrators and artists such as Respondent Jim Gingerich

[24] In addition, the affirmative defense, coupled with the CPPA's "appears to be" and "conveys the impression" provisions, creates an unconstitutional presumption that, if images in sexually explicit materials "appear to be" of minors or the promotion of such materials "conveys the impression" that minors are depicted, these materials, in fact, depict real minors. Under these provisions, the Government is no longer required to prove that the person depicted in proscribed materials was an actual minor — an essential element in child pornography cases. Instead, the burden of proving this requisite element is shifted to the defendant who must demonstrate the actual age of the performer as a part of the affirmative defense. *See* 18 U.S.C. § 2252A(c). To shift this burden, the Government only needs to show that the person depicted "appears to be" a minor or that the material was promoted in such a manner as to "convey the impression" that a minor is depicted. *See* 18 U.S.C. § 2256(8)(B) and (D). This presumption unconstitutionally relieves the Government of its burden of proof on an essential element of the offense. *See X-Citement Video, Inc.* 513 U.S. at 78 (prosecution required to prove defendant knew material was produced with the use of a minor); *Sandstrom v. Montana*, 442 U.S. 510, 525 (1979) (criminal jury instructions presuming a person intends the ordinary consequences of his voluntary act denies defendant due process); *Patterson v. New York*, 432 U.S. 197, 215 (1977) (defendant's due process rights violated when a presumption requires him to prove that he acted in the heat of passion upon sudden provocation).

whose sexually explicit works often depict images of persons created solely from the mind of the artist. Record 3. The affirmative defense also does not protect producers and distributors of computer-generated images who do not depict identifiable persons, but who create images exclusively from their imaginations.[25] Thus, producers and distributors who are prosecuted under the CPPA for creating or distributing a sexually explicit image of a person who appears to be a minor, but who is not in fact a real person, will not be exempt from criminal punishment because the producers cannot meet the first requirement of the affirmative defense. *See* 18 U.S.C. § 2252A(c)(1).

Second, the affirmative defense offers no protection to consumers and distributors who are not involved in the production of sexually explicit materials, and thus, have no way of knowing whether persons depicted in the materials are minors or, in some cases, real persons. This problem is compounded by the fact that the CPPA applies to *all* materials currently available and makes no concessions for the time period in which the material was produced. Thus, if retailers are prosecuted for distributing materials produced in the 1970s, prior to the enactment of federal record-keeping laws,[26] it would be nearly impossible to prove that the persons depicted in the materials were adults at the time the materials were produced.

Third, the affirmative defense contains the same vague language found in the CPPA's definition of child pornography because it requires a defendant charged with

[25] As the court of appeals correctly observed, the "appears to be" and "conveys the impression" provisions "criminalize the use of fictional images that involve no human being, whether that fictional person is over the statutory age and looks younger, or indeed, a fictional person under the prohibited age. Images that are, or can be, entirely the product of the mind are criminalized." Pet. App. 16a.

[26] These requirements were not instituted until 1988 when Congress passed the Child Pornography and Obscenity Enforcement Act. *See* 18 U.S.C. § 2257.

producing or distributing child pornography to show that the material was not promoted "in such a manner as to convey the impression" that it contained a illegally-depicted minor. 18 U.S.C. § 2252A(c)(3). This defense essentially attempts to limit the scope of the "conveys the impression" provision by using the same extraordinarily broad and undefined language. Under this circular framework, producers and distributors must satisfy the same vague standards that they are accused of violating. *See* 18 U.S.C. § 2256(8)(D); *see also* Part E of this argument *infra* (discussing the vagueness of this provision). This double dose of ambiguity further illustrates the insufficiency of the CPPA's affirmative defense. *See Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048-49 (1991).

Fourth, the affirmative defense offers no protection to those who possess material containing more than three sexually explicit images of persons who "appear to be" minors. The affirmative defense offers little, if any, narrowing of the CPPA for persons such as Respondent Bold Type, Inc., whose books on nudism may be wrongly interpreted as depicting minors engaging in sexually explicit conduct; Jim Gingerich, whose multiple paintings may be incorrectly viewed as depicting minors engaging in sexually explicit conduct; and Ron Raffaelli, whose erotic photography and books may also be inaccurately viewed as depicting children. Record 3. Still others who possess video collections, which include more than three films such as "Friday the 13th," "Taxi Driver," "Risky Business," "Fast Times at Ridgemont High," "Lolita," and "The Tin Drum," have absolutely no defense under 18 U.S.C. § 2252A(d) because they possess more than three images of so-called "child pornography."

And finally, even those persons who possess three or fewer images of persons who "appear to be" minors or whose advertising suggests the images might be of minors, must destroy or voluntarily forfeit these images in order to be protected. *See* 18 U.S.C. § 2252A(d). Thus, in order for persons to protect their expression under the CPPA, they must destroy

it. Such convoluted logic – to protect expression, you must destroy it – exposes the affirmative defense for what it truly is – a grossly inadequate remedy to an overly broad ban on constitutionally-protected speech.

E. The "Appears To Be" And "Conveys The Impression" Provisions Of The CPPA Are Unconstitutionally Vague.

Under the void-for-vagueness doctrine, laws can violate the Due Process Clause of the Fifth Amendment in two ways. First, laws violate the Due Process Clause when they do not give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, thereby failing to provide fair warning to those who wish to act lawfully.[27] *See Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). Second, laws violate the Due Process Clause when they impermissibly delegate fundamental questions of policy to police officers, judges, and juries, thereby allowing for resolution of those questions on "an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.* at 109. The CPPA violates due process in both of these ways.

First, the CPPA fails to define basic terms and phrases necessary to give persons of ordinary intelligence a basic understanding of what is prohibited. The CPPA fails to define its highly subjective, yet key, phrases "appears to be" and "conveys the impression." *See* 18 U.S.C. § 2256(8)(B),(D). Consequently, persons are left wondering: "Appears to whom to be a minor?" "Conveys to whom the impression that a minor is depicted?" "How does a minor appear?" and "What conveys the impression that a minor is depicted?" Without any clear

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[27] In cases where First Amendment interests are at stake, laws require an even greater degree of specificity. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (when laws interfere with speech, a more stringent vagueness test applies). This is particularly true for laws purporting to regulate child pornography, which are required to adequately define the prohibited conduct and suitably limit and describe the category of forbidden sexual conduct. *Ferber*, 458 U.S. at 764.

answers to these questions, law-abiding citizens attempting to conform their conduct to the law cannot know for certain what these phrases actually mean – particularly since age, as with beauty, is in the eye of the beholder. *See American Library Ass'n v. Reno*, 33 F.3d 78, 90 (D.C. Cir. 1994), *cert. denied*, 515 U.S. 1158 (1995) (recognizing the difficulty in distinguishing, based on appearances alone, whether performers are fourteen or eighteen, seventeen or twenty-one).[28]

Second, the failure to provide definitions to these key phrases gives law enforcement officials unbridled discretion in enforcing the CPPA. The undefined phrases of the CPPA permit law enforcement officials to make completely subjective judgments about whether an adult or a completely fictional character depicted in a sexually explicit work "appears to be a minor" and whether a depiction is advertised, promoted, presented, described, or distributed in such a manner that "conveys the impression" that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct. Given that a United States Senator has defined "safe-sex" educational materials as obscene[29] and a federal court has classified some visual depictions of fully clothed persons as "sexually explicit,"[30] one can only imagine the types of material that law enforcement officials will find criminal under the amorphous phrases "appears to be a minor" and "conveys the impression of a minor." Undoubtedly, the CPPA's failure to

[28] Distinguishing age based on physical appearances has become even more difficult of late, given the trend of children to reach physical puberty at ever earlier ages. *See* Michael D. Lemonick, "Teens Before Their Time," *Time*, Oct. 30, 2000.

[29] Senator Jesse Helms (R-NC) asserted that written educational materials promoting "safe sex" were "obscene." 133 Cong. Rec. S14203 (daily ed., Oct. 14, 1987).

[30] *See United States v. Knox*, 32 F.3d 733, 749 (3d Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995), where the court opined that the phrase "lascivious exhibition of the genitals or pubic area" does not require full or partial nudity, but can also apply to clothed persons as well.

define these phrases creates a "risk of discriminatory enforcement," which, when coupled with the severity of the criminal sanctions threatened by the Act, "raises special First Amendment concerns." *Reno*, 521 U.S. at 872 (finding that regulations of speech that threaten criminal sanctions, when coupled with the "'risk of discriminatory enforcement'" of vague regulations, "poses greater First Amendment concerns than those implicated by [ ] civil regulation[s]").

Petitioners attempt to remove the vagueness inherent in the CPPA by arguing that the "virtually indistinguishable" language taken from the general legislative findings provides the much-needed definitions for the "appears to be" and "conveys the impression" provisions left undefined by the CPPA.[31] *See* Pet. Brief 40. As discussed, *supra*, there is no valid basis for Petitioners' position that the CPPA is limited by the "virtually indistinguishable" language. Even assuming, *arguendo*, that a random phrase taken out of context from the general legislative findings of a statute can be utilized to define the text of a statute, it is not at all clear how the "virtually indistinguishable" language relied upon by Petitioners would cure the CPPA's vagueness.

By its terms, the "virtually indistinguishable" language cited by Petitioners merely narrows the category of depictions that can be banned by the CPPA from all visual depictions (which is what the text of the Act says) to "those depictions that are virtually indistinguishable to the unsuspecting viewer from unretouched photographic images." This does not even remotely address the issue of whether a person who is the subject of a depiction (whether the depiction is a painting, a cartoon, or something that is "virtually indistinguishable from [an] unretouched photographic image") "appears to be" or "conveys the impression of being" a minor.

[31] The fact that Petitioners felt the need to resort to the tactic of using the "virtually indistinguishable" language to supply some definition of the key phrases of the CPPA, in itself, illustrates that the CPPA lacks adequate language to avoid a finding of unconstitutional vagueness.

In a leap of logic, however, Petitioners lift the words "unsuspecting viewer" from this phrase, add a "reasonable man"[32] component to it, and apply the whole novel construct to the "appears to be" question. Specifically, Petitioners claim that the CPPA contains an "objective" test, which is whether "a reasonable unsuspecting viewer" would consider that a depiction "appears to be" or "conveys the impression of" a minor. Putting aside the fact that Petitioners are now wildly afield from anything in the actual language of the CPPA, even this test suffers from vagueness. Although Petitioners' argument has potentially answered the "appears to whom?" and "conveys to whom?" questions, it does not even begin to broach the questions of "how does a minor appear?" and "what conveys the impression that a minor is depicted?" For example, does a film showing sexual activity by a nineteen-year-old girl dressed in a cheerleading outfit "appear to be" a depiction of a minor? Reasonable minds will likely differ on this question.

Adding a reasonable person review to an inherently vague statute, as Petitioners have suggested doing to the CPPA, does not make the statute any less vague.[33] For example, if a statute banned all sexual depictions in movies that were "too long," and stated that the statute is to be interpreted in light of what a reasonable person would think was "too long," the statute would still be void for vagueness for its failure to provide an explicit definition of the phrase "too long." The same is true of the "appears to be" and "conveys the impression" language here. The very crux of the matter is that even reasonable people may differ on what "appears to be" a minor and what "conveys the

[32] The language relied upon by Petitioners does not require that the "unsuspecting viewer" be reasonable. *See* 18 U.S.C. § 2251 note (Supp. V 1999) (Historical & Statutory Notes).

[33] That is especially true here where the first order of business would be to determine exactly what is meant by the undefined phrase "unsuspecting viewer."

impression" that a minor is depicted.[34] Thus, the "reasonable unsuspecting viewer" language supplied by Petitioners does nothing to provide the "explicit standards" for enforcement required by the Due Process Clause. *See Grayned*, 408 U.S. at 108 (stating that in order to avoid being declared void for vagueness "laws must provide explicit standards for those who apply them"). An ordinary citizen attempting to conform his conduct to the law will be unable to discern which one of the many available "reasonable" interpretations of the CPPA's undefined phrases the judge or jury will decide to apply in his case.[35]

For these reasons, the "appears to be" and "conveys the impression" provisions of the CPPA, whether interpreted as written or as re-invented by Petitioners, are unconstitutionally vague.

[34] Further, this problem cannot be solved, as Petitioners suggest, merely by an examination of the physical characteristics of the persons depicted. *See American Library Ass'n*, 33 F.3d at 90 (recognizing the difficulty in distinguishing, based on appearances alone, whether performers are fourteen or eighteen, seventeen or twenty-one).

[35] Petitioners' reference to the CPPA's scienter requirement is, like its insertion of "reasonable unsuspecting viewer" language, inadequate to cure the vagueness of the statute and is, in fact, illogical. Saying that a conviction under the CPPA requires the defendant to "know" something that is inherently vague, and thus unknowable, such as whether a person "appears to be" a minor, is to say that there could never be a conviction under the CPPA, a result that Petitioners surely did not intend. Thus, Petitioners' argument that the CPPA cannot be considered vague because a defendant would have to know someone "appeared to be" a minor is not a credible solution to the vagueness problem.

CONCLUSION

It is abundantly clear that the CPPA's "appears to be" and "conveys the impression" provisions are unconstitutional. Accordingly, the court of appeals' judgment should be affirmed.

Respectfully submitted,

H. LOUIS SIRKIN
Counsel of Record
LAURA A. ABRAMS
JOHN P. FELDMEIER
SIRKIN, PINALES, MEZIBOV
& SCHWARTZ LLP
Attorneys for Respondents
920 Fourth and Race Tower
105 West Fourth Street
Cincinnati, Ohio 45202
(513) 721-4876